

Appl. No.: 10/792,107  
Amdt. dated December 31, 2008  
Reply to Office Action of October 3, 2008

### **REMARKS/ARGUMENTS**

These arguments, submitted in response to the Office Action dated October 3, 2008, are believed to be fully responsive to each point of rejection raised therein. Accordingly, favorable reconsideration is respectfully requested.

The Examiner has indicated that claims 1-21 are pending, however, claims 7-11, 13, 14, 17, 18, and 23-26 are withdrawn from consideration due to Applicant's election. The Examiner asserts that claims 1-6, 12, 15-16, 19-22, and 27-31 read on the elected species. Accordingly, the Examiner has only considered these claims in the present office action. Claims 2-6 and 16 were rejected under 35 U.S.C § 112, second paragraph; claims 1-6, 12, 15-16, 19-22 and 27-31 are rejected under 35 U.S.C § 102(b) as being anticipated by both Har (U.S. Patent 5,377,941) and Larkin (U.S. Patent 5,020,751).

### **35 U.S.C § 112, SECOND PARAGRAPH, REJECTION**

The Examiner has rejected claims 2-6 and 16 under 35 U.S.C § 112, second paragraph, because “[c]laim 2 recites ‘a plate that attaches to the surface’ and it is unclear if the surface intended to be part of the claims or if the claims are intending to be merely claim the surface. Clarification is required.”

Applicant has addressed this rejection many times in the past including (1) in response to the first office action over three (3) years ago; (2) in its appeal brief; and (3) in a subsequent response after the Examiner on his own initiative re-opened prosecution in view of Applicant's appeal brief. More specifically, in the very first substantive office action dated March 2, 2005, the Examiner rejected claim 2 stating, **“it is not clear if the . . . ‘surface’ [is] being recited functionally or positively.”** Applicant responded to this and similar rejections on numerous

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occasions including (1) in a response dated July 5, 2005; (2) in Applicant's Appeal Brief dated November 7, 2006; and (3) in Applicant's Amended Appeal Brief dated March 9, 2007.

Particularly, Applicant has stated:

It is clear that claim[] 2 . . . recite[s] . . . "surface" functionally. Claim 2, which depends on claim 1, recites, "a plate that attaches to *the surface*" . . . , referring back to the surface . . . recited in claim 1. In claim[] 2 . . . , with respect to the surface . . . , the plate and ring piece are defined in terms of attributes they possess and in terms of their functional interrelationship with the surface . . . when the plate and ring piece are used in its intended manner, rather than positively reciting the surface . . . . See, e.g., Ex parte Miller, No. 97-0972 (Bd. Pat. App. & Inter. 1998) (unpublished). In Ex parte Miller, the Examiner rejected a claim under 35 U.S.C. § 112, second paragraph, because the preamble recited "a theater seat hold-down device for maintaining a seat member" but the body of the claim recited "an elongated member . . . configured to engage at least one said seat member." The Examiner argued that "seat member" was functionally recited in the preamble but positively recited in the body and therefore presented an inconsistency thereby justifying a rejection under 35 U.S.C. § 112, second paragraph. The Board reversed the Examiner's rejection, holding:

We do not agree with the examiner's position. The examiner apparently recognizes that the appellants, by setting forth functional recitations such as that of the hold-down device being "adapted" to engage the theater seat, have not positively recited the theater seat as a part of the claimed combination. Nevertheless, the examiner has taken the position that limitations such as that of the of hold-down device being "configured" (i.e, shaped) to engage a portion of a theater seat (previously set forth in the preamble), positively claim the theater seat as part of the claimed combination. **We must point out, however, that by reciting such language the appellants have merely defined the hold-down member in terms of attributes it must possess and, therefore, this language is also functional in character. That is, the appellants are merely defining the shape or structural configuration of the hold-down device in terms of its**

**functional interrelationship with the theater seat when it is used in its intended manner, rather than positively reciting the theater seat as a part of the claimed combination.** Since we are not of the opinion that the theater seat has been positively set forth as a part of the claimed combination, we find no inconsistency between the preamble and the body of the claim as the examiner asserts. This being the case, we will not sustain the rejection of claims 1-12 under 35 U.S.C. § 112, second paragraph.

(emphasis added). The Examiner provides no support for why the claims are indefinite based on what the Examiner has pointed to as the alleged problem. The

In view of the Appeal Brief, in the office action dated July 17, 2007, the Examiner reopened prosecution and withdrew the rejection of claim 2 under 35 U.S.C. § 112, second paragraph and merely objected to claim 2. In a response to the objection, Applicant argued in a response dated December 17, 2007:

Prior to Applicant's Appeal Brief, the Examiner rejected claims 2, 9, 19, 21, 29, and 31 under 35 U.S.C. § 112, second paragraph, for the exact same reasons that the Examiner now objects to these claims. However, now, the Examiner continues to maintain the same arguments with respect to the language of claims 2, 9, 19, 21, 29, and 31 after the Examiner elected to reopen prosecution of the application instead of responding to Applicant's arguments when the issue was ready for review by the Board. However, now the Examiner has withdrawn the rejection under 35 U.S.C. § 112, second paragraph and only "objects" to the claims for the same reason. By withdrawing the rejection under 35 U.S.C. § 112, second paragraph, the Examiner admits that the claim language satisfies the statutory requirements of 35 U.S.C. § 112, second paragraph. Accordingly, pursuant MPEP 2173.02, Applicant respectfully requests that the Examiner provide suggested language since Applicant disagrees with the Examiner *unsupported* assessment of these claims, particularly in view of Ex parte Miller, as explained in Applicant's Appeal Brief, which is incorporated by reference.

MPEP 2173.02 provides:

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[I]f the language used by applicant satisfies the statutory requirements of 35 U.S.C. 112, second paragraph, but the examiner merely wants the applicant to improve the clarity or precision of the language used, the claim must not be rejected under 35 U.S.C. 112, second paragraph, rather, the examiner should suggest improved language to the applicant.

Applicant can see no difference between the manner in which “the surface” and “storage unit” is recited in the present claims and the manner in which “theater seat” was recited *with approval* in Ex parte Miller. . . .

. . .

In claims 2, 19, 21, and 29, the plate, ring piece, and cover are defined in terms of attributes they possess and in terms of their functional interrelationship with the surface, storage unit, and wastebasket when the plate, ring piece, and cover are used in their intended manner, rather than positively reciting the surface, storage unit, and wastebasket.

Accordingly, if the Examiner continues to maintain this objection, Applicant respectfully requests that the Examiner suggest language to his satisfaction for these claims.

After the Examiner withdrew the rejection of claim 2 under 35 U.S.C. § 112, second paragraph, and merely objected to claim 2 in the office action dated July 17, 2007, the Examiner now is once again rejecting to claim 2 under 35 U.S.C. § 112, second paragraph. This practice of continually changing the line is not fair to Applicant. See, e.g., MPEP 706 (“The goal of examination is to clearly articulate any rejection early in the prosecution process so that the applicant has the opportunity to provide evidence of patentability and otherwise reply completely at the earliest opportunity.”)

Furthermore, the Examiner admitted in the office action dated July 2, 2007, that the surface is “not apart of the claimed invention.”

In view of Applicant’s numerous clarifications including Federal Circuit authority in

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support of Applicant's position and the Examiner's own admission, Applicant does not understand why further clarification is needed and why the Examiner continues to reject or object to claim 2 without any support from federal case law, the MPEP, the CFR, or any other authority. Applicant respectfully submits that claims 2-6 and 16 satisfy 35 U.S.C. § 112, second paragraph, which the Examiner previously admitted by previously withdrawing this rejection from these claims.

### **35 U.S.C § 102(B) REJECTIONS GENERALLY**

The Examiner has rejected claims 1-6, 12, 15-16, 19-22, and 27-31 under 35 U.S.C. § 102 for the same reasons that these claims were rejected in the office action dated July 17, 2007. Applicant completely responded to these rejections in a response dated December 17, 2007, in which Applicant raised numerous arguments traversing the Examiner's § 102 rejections. Instead of responding to all the material traversed in Applicant's response, the Examiner merely produced essentially a carbon copy Office Action thereby further delaying the prosecuting of this application, an application that has been pending since March 3, 2004. This practice is not fair to Applicant.

### **35 U.S.C § 102(B) REJECTIONS IN VIEW OF HAR**

Claims 1-6, 12, 15-16, 19-22, and 27-31 are rejected under 35 U.S.C § 102(b) as being anticipated by Har. Applicant respectfully submits that Har does not disclose each and every element recited in these claims and, therefore, does not anticipate these claims. MPEP 2131. Furthermore, the various functional limitations in the claims set forth a function which the apparatus must be structurally capable of performing and such as functional statement must be given full weight and may not be disregarded in evaluating the patentability of the claims. See,

e.g., In re Venezia, 530 F.2d 956, 189 USPQ 149 (CCPA 1976); MPEP 2173.05(g).

Har does not disclose “a cover attached to the holder, wherein the cover is sized to conceal in whole or in part the storage unit.” The Examiner contends that element 32 of Har is the cover recited in claim 1. First, element 32 is a top lid and not a cover as contemplated by the specification and recited in claim 1. Second, element 32 is not “sized to conceal” a storage unit, which the Examiner points to as element 27, which Har discloses is “a large central opening.” Col. 3, ll. 40-41. Applicant will assume that the Examiner intend to cite to element 30 (i.e. a waste or garbage bag). Har discloses:

The sink waste bag support device of this invention is generally indicated by the reference numeral 20 in FIG. 1. It is comprised of a support base 22 supported on a corner rim of sink 24. A support frame having a large central opening 27, is hingedly mounted upon the support base **to receive folded over top edges 28 of a waste or garbage bag 30** shown in dotted line over the top of the sink and support base and under the support frame in clamping relation. A hinged lid 32, generally congruent with the support frame is employed to cover the support frame and bag.

Col. 3, ll. 37-47. As shown in Fig. 1 and disclosed in the specification, element 30 (i.e., the allege storage unit) is provided on the outside of support frame 26, and when the lid 32 is closed, even from a top view, it does not conceal element 30. As shown in Fig. 1, element 30 can extend beyond the outside border of support frame 26 and cover 32. Furthermore, because element 30 is not otherwise secured to prevent movement beyond the outside border, Har simply does not disclose or suggest concealing element 30. For at least these reasons, claim 1 and claims 2-6, 15, 16, and 19-22, which depend from claim 1, are patentable over Har.

Claim 19 recites that “the cover is sized and positioned on the holder to conceal **in whole** the storage unit from being viewed in a first direction.” Claim 20, which depend from claims 19,

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recites that the first direction is directed toward a **front elevation**. Har does not teach or suggest that the alleged cover (element 32) conceals **in whole** the storage unit when viewed from a first direction or a direction directed toward a **front elevation**. That is, Fig. 1 shows that element 30 can extend beyond the lid 32 and can be seen from a top view; Har does not teach or suggest that lid 32 conceals element 30. Furthermore, Fig. 1 shows that element 30 can be completely seen from a front elevation. One of ordinary skill in the art understands that a “front elevation” is a view from the front and not a view from the top. See, e.g., U.S. Department of Commerce Patent and Trademark Office, A Guide To Filing A Design Patent Application at <http://www.uspto.gov/web/offices/pac/design/index.html>, retrieved on December 17, 2007 (“The Figure Descriptions indicate what each view of the drawings represents, i.e., front elevation, top plan, perspective view, etc.”); The American Heritage Dictionary of the English Language, 4th ed. Boston: Houghton Mifflin, 2000 (defining elevation as “A scale drawing of the side, front, or rear of a structure.”). Thus, Har does not disclose that the lid 32 conceals **in whole** element 30; furthermore, Har does not disclose that the lid 32 conceals in whole element 30 **when viewed from a front elevation**. The Examiner does not particularly point out where Har discloses this element. If Examiner continues to maintain this rejection, Applicant respectfully requests that the Examiner particularly point out where Har discloses this element. See 37 CFR § 1.104 (“When a reference is complex . . . the particular part relied on must be designated as nearly as practicable.”); MPEP § 706 (“The goal of examination is to clearly articulate any rejection early in the prosecution process so that the applicant has the opportunity to provide evidence of patentability and otherwise reply completely at the earliest opportunity.”). For these additional reasons, claims 19 and 20, and claim 22, which depend from claim 19, are patentable over Har.

Claim 21 recites, “the cover is sized and positioned on the holder to conceal **in whole the storage unit and holder** from being viewed in a first direction.” Claim 22, which depends from claim 21, recites that the first direction is directed toward a front elevation. Har does not teach or suggest that the alleged cover (element 32) conceals in whole a storage unit and holder when viewed from a first direction or a direction directed toward a front elevation. The Examiner indicates that the holder comprises elements 26, 22, and 50. However, the lid 32 does conceal in whole the alleged storage unit and holder when viewed from a first direction (claim 21) or a direction directed toward a front elevation (claim 22). For these additional reasons, claims 21 and 22 are patentable over Har. The Examiner does not particularly point out where Har discloses these elements. If Examiner continues to maintain this rejection, Applicant respectfully requests that the Examiner particularly point out where Har discloses these elements. See 37 CFR § 1.104; MPEP § 706.

Claim 27 recites, “a cover connected to the holder and structured and positioned on the holder to conceal a container held by the holder from being viewed in at least one direction.” Claims 28, which depends from claim 27, recites that the at least one direction is directed toward a front elevation. For the reasons discussed above, Har does not disclose these elements. Accordingly, claims 27 and 28 are patentable over Har.

Claim 29 recites, “a cover . . . that includes at least one surface with dimensions equivalent to or greater than at least one surface of a wastebasket supported by the holder and wherein the cover is connected to the third section of the holder in an orientation that hides the at least one surface of the wastebasket from being seen from at least one direction.” Claims 30, which depends from claim 29, recites that the at least one direction is directed toward a front



elevation. Har does not teach or suggest that the alleged cover (element 32) includes “at least one surface with dimensions equivalent to or greater than at least one surface of a wastebasket.” The Examiner does not particularly point out the “at least one **surface**” of element 30 that at least one surface of element 32 is allegedly equivalent to or greater than. Also, for the reason discussed above, Har does not teach or suggest that “the cover is connected to the third section of the holder in an orientation that hides the at least one surface of the wastebasket from being seen from at least one direction” or a front elevation. Accordingly, for at least these reasons, claims 29 and 30, and claim 31, which depends from claim 29, are patentable over Har. If Examiner continues to maintain this rejection, Applicant respectfully requests that the Examiner particularly point out where Har discloses these elements. See 37 CFR § 1.104; MPEP § 706.

Claim 12 recites an apparatus comprising means for securing a storage unit to a surface; and means for concealing in whole or in part means for securing. The “means for securing” element is a means plus function element and the structure described in the specification as corresponding to the claimed function are at least any of the following groups of elements: 110 or 210-230 or 210, 220, and 230’, or 710-730. The “means for concealing” element is a means plus function element and the structure described in the specification as corresponding to the claimed function are at least elements 120 and/or 740. The Examiner contends that the means for securing in Har are elements 50 and 52 and that the means for concealing is element 32. However, these elements in Har are different than and are not equivalent to the corresponding structure for first means for securing and second means for concealing as set forth above. For at least these reasons, claim 12 is patentable over Har.

Accordingly, for the reasons set forth above, claims 1-6, 12, 15-16, 19-22, and 27-31 are

patentable over Har.

**35 U.S.C § 102(B) REJECTIONS IN VIEW OF LARKIN**

Claims 1-6, 12, 15-16, 19-22 and 27-31 are rejected under 35 U.S.C § 102(b) as being anticipated by Larkin. Applicant respectfully submits that Larkin does not disclose each and every element cited in these claims and, therefore, does not anticipate these claims. MPEP 2131. Furthermore, the various functional limitations in the claims set forth a function which the apparatus must be structurally capable of performing and such a functional statement must be given full weight and may not be disregarded in evaluating the patentability of the claims. See, e.g.; In re Venezia, 530 F.2d 956, 189 USPQ 149 (CCPA 1976); MPEP 2173.05(g).

Larkin does not disclose “a cover attached to the holder, wherein the cover is sized to conceal in whole or in part the storage unit.” The Examiner contends that element 32 of Larkin is the cover recited in claim 1. First, element 32 is a top lid and not a cover as contemplated by the specification and recited in claim 1. Second, element 32 is not “sized to conceal” a storage unit, which the Examiner points to as element 50. More specifically, Larkin discloses:

In FIG. 1, the garbage bag 50 is **retained on the outside of the ring 12 by a cord 16**, preferably made of an elastic material. While the garbage bag 50 has been shown on the outside of the ring 12, greater strength may be obtained by **installing the garbage bag 50 on the inside of the ring and having the outer edge fall down on the outside of the ring**, so that the weight of material in the garbage bag 50 pulls the upper edge of the garbage bag 50 and the cord 16 up against the lip 14 which surrounds the ring 12.

Col. 2, II. 11-22. Furthermore, the only disclosure in Larkin regarding the lid 32, provides:

The ring 12 is provided with a lid 32 attached to hinge 34, which may be bolted onto the arm 18 by bolts 36 passing into holes 38 of the arm 18. The lid 32 is particularly useful for situations where the garbage bag holder 10 is used indoors.

Col. 2, II. 44-48, As shown in Figs. 1 and 2 and disclosed in the specification, element 50 (i.e., the allege storage unit) is provided on the outside of ring 12, and when the lid 32 is closed, even from a top view, it does not conceal element 50. As shown in Figs. 1 and 2, element 50 can extend beyond the outside border of the ring 12 and cover 32. Fig. 2 shows element 50 extending beyond the outside border; furthermore, because element 50 is not otherwise secured to prevent movement beyond the outside border, Larkin simply does not disclose or suggest concealing element 50. For at least these reasons, claim 1 and claims 2-6, 15, 16, and 19-22, which depend from claim 1, are patentable over Larkin.

Claim 19 recites that “the cover is sized and positioned on the holder to conceal **in whole** the storage unit from being viewed in a first direction.” Claim 20, which depend from claims 19, recites that the first direction is directed toward a **front elevation**. Larkin does not teach or suggest that the alleged cover (element 32) conceals **in whole** the storage unit when viewed from a first direction or a direction directed toward a **front elevation**. That is, Figs. 1 and 2 show that element 50 can extend beyond the lid 32 and can be seen from a top view; furthermore, Figs. 1 and 2 show that element 50 can be completely seen from a front elevation. One of ordinary skill in the art understands that a “front elevation” is a view from the front and not a view from the top. See, e.g., U.S.Department of Commerce Patent and Trademark Office, A Guide To Filing A Design Patent Application at <http://www.uspto.gov/web/offices/pac/design/index.html>, retrieved on December 17, 2007 (“The Figure Descriptions indicate what each view of the

drawings represents, i.e., front elevation, top plan, perspective view, etc.”); The American Heritage Dictionary of the English Language, 4th ed. Boston: Houghton Mifflin, 2000 (defining elevation as “A scale drawing of the side, front, or rear of a structure.”). Thus, Larkin does not disclose that the lid 32 conceals **in whole** element 50; furthermore, Larkin does not disclose that the lid 32 conceals in whole element 50 **when viewed from a front elevation**. The Examiner does not particularly point out where Larkin discloses this element. If Examiner continues to maintain this rejection, Applicant respectfully requests that the Examiner particularly point out where Larkin discloses this element. See 37 CFR § 1.104 (“When a reference is complex . . . the particular part relied on must be designated as nearly as practicable.”); MPEP § 706 (“The goal of examination is to clearly articulate any rejection early in the prosecution process so that the applicant has the opportunity to provide evidence of patentability and otherwise reply completely at the earliest opportunity.”). For these additional reasons, claims 19 and 20, and claim 22, which depend from claim 19, are patentable over Larkin.

Claim 21 recites, “the cover is sized and positioned on the holder to conceal **in whole** the **storage unit and holder** from being viewed in a first direction.” Claim 22, which depends from claim 21, recites that the first direction is directed toward a front elevation. Larkin does not teach or suggest that the alleged cover (element 32) conceals in whole a storage unit and holder when viewed from a first direction or a direction directed toward a front elevation. The Examiner indicates that the holder comprises elements 14, 16, 18, and 60; however, the holder also includes elements 20, 26, and 42. See Larkin col. 2, II. 9-60, As shown in Figs. 1 and 2, the lid 32 does conceal in whole the alleged storage unit and holder

when viewed from a first direction (claim 21) or a direction directed toward a front elevation (claim 22). For these additional reasons, claims 21 and 22 are patentable over Larkin. The Examiner does not particularly point out where Larkin discloses these elements. If Examiner continues to maintain this rejection, Applicant respectfully requests that the Examiner particularly point out where Larkin discloses these elements. See 37 CFR § 1.104; MPEP § 706.

Claim 27 recites, “a cover connected to the holder and structured and positioned on the holder to conceal a container held by the holder from being viewed in at least one direction.” Claims 28, which depends from claim 27, recites that the at least one direction is directed toward a front elevation. For the reasons discussed above, Larkin does not disclose these elements. Accordingly, claim 27 and 28 are patentable over Larkin.

Claim 29 recites, “a cover . . . that includes at least one surface with dimensions equivalent to or greater than at least one surface of a wastebasket supported by the holder and wherein the cover is connected to the third section of the holder in an orientation that hides the at least one surface of the wastebasket from being seen from at least one direction.” Claims 30, which depends from claim 29, recites that the at least one direction is directed toward a front elevation. Larkin does not teach or suggest that the alleged cover (element 32) includes “at least one surface with dimensions equivalent to or greater than at least one surface of a wastebasket.” The Examiner does not particularly point out the “at least one **surface**” of element 50 that at least one surface of element 32 is allegedly equivalent to or greater than. Also, for the reason discussed above, Larkin does not teach or suggest that “the cover is connected to the third section of the holder in an orientation that hides the at least one surface of the wastebasket from being seen from at least one direction” or a front elevation.

Accordingly, for at least these reasons, claims 29 and 30, and claim 31, which depends from claim 29, are patentable over Larkin. If Examiner continues to maintain this rejection, Applicant respectfully requests that the Examiner particularly point out where Larkin discloses these elements. See, 37 CFR § 1.104; MPEP § 706.

Claim 4 recites that “wherein the cover comprises a second mounting piece connected to the first mounting piece.” The Examiner identifies element 42 as the first mounting piece and element 36 as the second mounting piece. For Larkin to anticipate this claim, element 36 must be connected to element 42. As shown in Fig. 1, this is clearly not the case. To get around this missing element, the Examiner attempts to reason that element 36 is connected to element 42 via element 18; however, this is an improper construction of connected. This invention is not an electrical invention in which “connected” generally is construed broadly; but, in the mechanical context, it’s unreasonable to assert that two pieces are connected when they are joined by a multiplied of intervening pieces as shown in Figs. 1 and 2. Furthermore, with respect to claim 16, which recites, “a second mounting piece structured to attach to the cover and first mounting piece”, Larkin does not disclose that element 36 is structured to attach to element 42. For this additional reason, claim 4 and claims 5-6, which depend from claim 6, are patentable over Larkin.

Claim 12 recites an apparatus comprising means for securing a storage unit to a surface; and means for concealing in whole or in part means for securing. The “means for securing” element is a means plus function element and the structure described in the specification as corresponding to the claimed function are at least any of the following groups of elements: 110 or 210-230 or 210, 220, and 230’, or 710-730. The “means for concealing” element is a means

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plus function element and the structure described in the specification as corresponding to the claimed function are at least elements 120 and/or 740. The Examiner contends that the means for securing in Larkin are elements 60, 42, and 14 and that the means for concealing is element 32. However, these elements in Larkin are different than and are not equivalent to the corresponding structure for first means for securing and second means for concealing as set forth above. For at least these reasons, claim 12 is patentable over Larkin.

Accordingly, for the reasons set forth above, claims 1-6, 12, 15-16, 19-22, and 27-31 are patentable over Larkin.

#### **DUTY TO ANSWER ALL MATERIAL TRAVERSED**

Applicant has raised numerous arguments above traversing the Examiner's rejections. The Examiner is respectfully reminded of the duty to answer all material traversed. See, e.g., MPEP § 707.07(f).

#### **IF THE EXAMINER RAISES ANY NEW GROUNDS OF REJECTIONS, THE SUBSEQUENT OFFICE ACTION MUST BE A NON-FINAL OFFICE ACTION**

Applicant has made no amendments to the claims. Accordingly, any new grounds of rejections will not be necessitated by Applicant's amendment to the claims, but instead by the arguments raised above. As such, if the Examiner raises any new grounds of rejections, the subsequent office action must be a non-final office action. See, MPEP 706.07(a).

#### **CONCLUSION**

In view of the foregoing amendments and remarks, Applicant respectfully requests the reconsideration and reexamination of this application and the timely allowance of the pending claims. Please grant any extensions of time required to enter this response and charge any

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additional required fees to Deposit Account No. 16-0605.

Respectfully submitted,

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